

No. 2481.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In Re PAT GIBBONS, Involuntary Bankrupt,

MARY L. GIBBONS,
Petitioner,
vs.
J. S. GOLDSMITH, Trustee in
bankruptcy, of the estate of
Pat Gibbons, involuntary bank-
rupt, and PAT GIBBONS,
Respondents.

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OPENING BRIEF OF PETITIONER

ISRAEL & KOHLHASE,
Solicitors for Mary L. Gibbons,
207-8-9 Oriental Building.
Seattle, Washington.

JOSEPH W. ROBINSON,
Of Counsel for Mary L. Gibbons.
902 Lowman Building,
Seattle, Washington.

Filed

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OPENING BRIEF OF PETITIONER

STATEMENT ON MERITS.

1. Your petitioner seeks to review in these proceedings, the action of the United States District Court, of the Western District of Washington, Northern Division, in confirming certain orders of

the referee in bankruptcy, in the involuntary bankruptcy proceedings of Pat Gibbons, and in requiring your petitioner to propound her claim and establish her title to certain property and moneys, arising from the sale of the community real property of your petitioner and her husband, Pat Gibbons, based upon the following facts contained in the record.

2. In January, 1912, Pat Gibbons was adjudged an involuntary bankrupt, upon a petition of certain of his creditors. He was, at the time, the husband of this petitioner, Mary L. Gibbons, but she was not made a party to the proceedings by the creditors for bankruptcy, adjudicated against, nor was the community, consisting of Gibbons and his wife, mentioned therein, and the petition for involuntary bankruptcy referred only to Gibbons, as an individual, and to his debts. At the time of this adjudication as to Gibbons, he and your petitioner, his wife, owned and had owned for many years, prior thereto, 640 acres of coal land, described as Section 16, Township 21, North Range 72, W. N., situate in King County, Washington, upon which, there was a developed coal mine, known as the "Occidental Coal Mine", which coal mine was being operated by F. A. Ketcham, under a twenty-five years' lease to him,

by Gibbons and wife, dated November 30, 1910. Under the terms of this lease, the lessee was required to pay rentals by way of royalty for the amount of coal and other mineral products taken from said community lands, and provided for a minimum rental of \$2,500 per annum, payable quarterly. These lands containing the coal, were acquired during the married life of Gibbons and wife, through their joint efforts, and it is admitted in these records, that these lands and the coal taken therefrom was community property, one-half thereof, belonging to each member of the community, under the laws of the State of Washington, the title to which rested in the community, composed of the husband and wife, and that each member of the community had a vested right in and to one-half of this property, under the laws and the decisions of the court of last resort in the State of Washington.

Mary L. Gibbons, the wife, in no way consented, nor was she a party to the bankruptcy proceedings against her husband, Pat Gibbons. The trustee assumed that he had the right as trustee in bankruptcy, to the possession of this community real property, and took at least constructive possession thereof, caused the coal lands to be appraised in the

bankruptcy proceedings, and the appraisers valued the lands, regardless of the lease for the coal, at \$145,000 and the lands subject to the lease of the value of \$100,000, and also appraised a mile and a half of standard gauge railway, situate upon said land, and used in connection with the development of the coal mine, at \$6,000.

In June, 1914, the trustee in said bankruptcy's estate of Pat Gibbons, and without the community or the community estate being made a party to the bankruptcy proceedings and without notice to your petitioner, under order of the referee in bankruptcy, sold the coal lands herein described, for the sum of \$48,050, which was paid to the trustee in cash and received and retained by him as funds of the alleged estate of the involuntary bankrupt Gibbons. When the trustee qualified in the bankruptcy proceedings, upon allegations that he did not want to do any act to prevent him from repudiating the lease or denying the validity of the lease, and after he had taken such possession as he had of these lands, refused to accept the rentals earned under the lease, and the lessee thereupon, from time to time, as the lease required, paid in to the Seattle National Bank of Seattle, Washington, various sums of money, which the lessee paid as rent and royalty, under the terms of

the lease and at the time of the sale by the trustee of said coal mining property, this fund in the Seattle National Bank, amounted to \$8,174.51, which money still remains in the possession and control of said bank. After the adjudication of bankruptcy, various creditors of Gibbons proved their claims before the referee, but substantially all those claims filed by the creditors, was the separate indebtedness of the said Pat Gibbons, and not an indebtedness against the community consisting of Pat Gibbons and his wife, your petitioner. No attempt was ever made in this bankruptcy proceeding to determine the character of the claims proven as to whether they were the separate debts of Pat Gibbons, or community debts, nor was any attempt ever made to determine whether or not the community consisting of Gibbons and wife was bankrupt or insolvent, as distinguished from the bankruptcy or insolvency as to Pat Gibbons, as to his separate indebtedness, and no steps were taken to bring the community or the wife before the court in bankruptcy prior to the issuing of the show cause order.

3. In June, 1914, the trustee in the Pat Gibbons' bankruptcy proceedings, filed a petition with the referee in bankruptcy, setting forth that there had

come into his possession \$48,050, being the proceeds of the sale of these community coal lands, the same having been purchased by Dexter Horton Trust and Savings Bank; that the Seattle National Bank of Seattle, held at least \$8,174.51 paid into the bank by the lessee, by way of rents and royalties under the terms of the lease, as to the coal lands, which rent or royalty had been paid into the bank because the trustee refused to accept it and because the trustee did not then desire to recognize the validity of the lease, not so far as it effected or might effect the proceedings in bankruptcy against Pat Gibbons, and stating in his petition that he had now determined to accept this money paid into the Seattle National Bank, as rentals and royalty by the lessee, under the lease of Gibbons and wife, but the Seattle National Bank refused to pay these funds over to the trustee, alleging as a reason therefor that Mary L. Gibbons, (your petitioner), as wife of the said Pat Gibbons, the bankrupt, asserted some right, title, claim or interest in said funds, and alleging that he, the trustee, was advised and believed the facts to be that the said Mary L. Gibbons has no right, title or interest in and to said funds, derived from the sale of said property, then in possession and control of the trustee, or, in and to the funds in the possession of the

Seattle National Bank, and further alleged in his petition that notwithstanding his belief, that the wife had no interest in these funds, that it was advisable that some final determination be made by the referee in bankruptcy as to the rights of said Mary L. Gibbons in said money, if any she had, and prayed that a show cause order issue against the Seattle National Bank, requiring the bank to pay over the money to the trustee or show cause, why he should not do so, and also, for a show cause order, requiring Mary L. Gibbons, your petitioner, to appear and assert and propound to the referee in bankruptcy, any right, title, claim or interest, which she had or made or claimed to have in the moneys in the possession of the trustee and in the moneys in the possession of the Seattle National Bank, and provide that in case she failed so to do, that she be barred from any right, title or interest in and to such property.

On June 24, 1914, the referee in bankruptcy, based upon the trustee's petition, made an order, requiring that Mary L. Gibbons, your petitioner, as the wife of Pat Gibbons, the bankrupt, and as a member of said community to appear before the referee and assert and propound her right, title, claim or interest or whatever right, title, claim or

interest she had or claim in and to said lands and coal claims and the moneys mentioned in the petition, to-wit: the moneys for which the property had been sold, the rentals or royalty under the community lease paid into the bank, and the trustee caused this order and the petition to be served upon Mary L. Gibbons, personally.

4. On August 7th, your petitioner made her special appearance in answer to the show cause order or citation, and objected to the jurisdiction of the court, and sought to quash the citation because of lack of jurisdiction of your petitioner, or to hear or determine the subject matter, in so far as the property interest and rights of the petitioner were concerned. (See Trs., page 15.)

Her motion was overruled and she was ordered to file an answer, which she did, without waiving the special appearance and preserving her rights under her special appearance, which answer is found in the transcript, page 15.

In this verified answer, she denied the material allegations of the petition of the trustee, based upon which, the show cause order and citation were issued, and set up affirmatively, that all the property from which the funds in the hands of the trustee and in

the possession of the bank, had been acquired, was and at all times, during the existence of the bankruptcy proceedings, had been, the community property of herself and Pat Gibbons; she also alleged that long prior to the attempted sale of said property, she had filed in the County Auditor's office of King County, Washington, the county in which said lands were situate, under the provisions of the Washington statute, her claim of community interest in that property, and that substantially, the entire indebtedness alleged to be owing by the involuntary bankrupt, Pat Gibbons, and that all the claims filed or proven against the said bankrupt, were the separate debts of Pat Gibbons, and not an indebtedness of or against the community, consisting of Pat Gibbons and wife. The trustee filed a reply, denying the material allegations of the affirmative matters. (Trs., page 20.)

Without submitting or permitting any evidence in support of any of the issues presented by the petition, answer and reply, the referee entered an order, adjudging that the trustee was entitled to the sole possession and control of all the community property of Pat Gibbons and his wife, your petitioner, and the funds derived therefrom, both as to the sale of the property and the rentals under the

lease, and that all the community property and said funds were subject to administration and distribution in the bankruptcy proceedings, in such manner as the court might thereafter direct, and set the matter of administration and distribution for hearing before the referee, on August 13, 1914, and entered an order, directing that at such time, your petitioner, Mary L. Gibbons, appear and propound her claim and title, if any she had, in and to said moneys, so in possession of the trustee and the Seattle National Bank.

A petition for a review of the action of the referee in bankruptcy, in all these particulars, was filed before the District Judge, and was heard by him on August 28, 1914, and the District Judge filed a memorandum decision and thereafter an order and judgment upholding and confirming the orders of the referee in bankruptcy. (Trs. page 23-30.)

From this confirming order of the District Court the petitioner, Mary L. Gibbons, presents this application for revision of such order and the orders of the referee.

ASSIGNMENT OF ERRORS.

I.

5. The District Court erred in overruling the objections of the petitioner to the jurisdiction of the court in bankruptcy and in denying petitioner's motion to quash the order, requiring your petitioner, as the wife of Pat Gibbons, the bankrupt herein, to appear before the referee and assert and propound her title and claim to the property described in the order issued in the nature of a citation on June 24, 1914, and in holding that the petition, upon which, said order was based, was sufficient to give the court in bankruptcy jurisdiction of your petitioner, or her interest in said property, or of the community, consisting of Gibbons and wife, or the community property, or any portion thereof. (See Petitions and Order, Trs. pages 1-15.)

II.

The District Court erred in confirming the referee's order adjudging that the trustee was entitled to the sole possession and control of the community property of Gibbons and wife, your petitioner.

III.

The District Court erred in confirming the order of the referee, adjudging the trustee entitled to the sole possession and control of the funds derived from the sale of said community property of said bankrupt and wife, your petitioner, including the rentals and royalty for coal, under the lease of the lands, belonging to the community, on deposit in the Seattle National Bank, and deposited in said bank, by the lessee of the Occidental Coal Mine.

IV.

The District Court erred in holding that all the community property, including the proceeds of sale and the royalties from coal, was subject to distribution in the bankruptcy proceedings, and in directing the Seattle National Bank to deliver possession of such funds in its possession to the trustee in bankruptcy.

V.

The District Court erred in confirming the order of the referee in bankruptcy, as to the various matters set forth in the opinion of the court, based upon the petition to require your petitioner and said bank to appear and show cause why it did not turn over to the trustee, moneys in its possession, paid

into the bank by the lessee under the lease, and to require your petitioner to set forth and propound her title and claims to the community property, including the funds arising from the sale of the community real property by the trustee in bankruptcy and in and to the funds in the possession of the bank, by way of royalties for coal, taken from the community lands, as set forth in the memorandum decision, filed August 28, 1914, and the order based thereon, filed September 3, 1914. (See Opinion, Trs. pages 24-31.)

VI.

The District Court erred in holding, as a matter of law, that the court in bankruptcy had jurisdiction of the person of your petitioner, or the subject matter set forth in the pleadings so as to give the court jurisdiction thereof, based on the facts set forth in the petition of the trustee, for an order requiring the bank and your petitioner to show cause, etc., (Trs. pages 7-14), and the answer of your petitioner thereto, (Trs. pages 15-19), and the reply of the trustee to the answer, (Trs. pages 20-21), and in holding that the court in bankruptcy had jurisdiction, either of the subject matter or of your petitioner or of said Seattle National Bank.

VII.

The District Court erred in not holding that the community, consisting of Pat Gibbons and your petitioner, as such, had not been brought before the court, and in not holding that the court had no jurisdiction of the community or of your petitioner as a member thereof, or of Pat Gibbons, the bankrupt, as a member of such community, and in not dismissing your petitioner from such proceedings.

VIII.

The District Court erred in upholding the legality of the sale by the trustee of the community property, and in adjudging that the court in bankruptcy had jurisdiction thereof.

ARGUMENT AND CITATION.

6. In the State of Washington under the community system of ownership of property by husband and wife, there exists as to such husband and wife, three distinct estates.

First: The estate of the husband consisting of property acquired before his marriage and thereafter by gift, devise, or descent, which is his separate estate and in which his wife has no interest, and of

which he can make disposition and conveyance without his wife joining him.

Sec. 5915, *Rem. & Bal. Code Wash.*, Vol. 2.

Second: The separate estate of the wife, consisting of property owned by her at the time of her marriage, or subsequently acquired by gift, devise, or descent, which estate can be conveyed by the wife without her husband joining, and over which the husband has no control.

Sec. 5916, *Rem. & Bal. Code Wash.*, Vol. 2.

Third: The community estate consisting of property acquired by either husband or wife or jointly through earnings of both or either and the accumulations from funds derived therefrom, which can only be encumbered or conveyed by the joint deed of a husband and wife. All attempts to convey or encumber the same by either the husband or wife alone, are null and void.

Sec. 5917, *Rem. & Bal. Code Wash.*, Vol. 2.

7. The community property law of the State of Washington has been the cause of much litigation, ever since its enactment in 1879, but there are certain propositions of law with reference to which, there is no longer any dispute, either in the State or Federal Courts, and among these, are:

(a) That the community, consisting of the husband and wife, is a compound creature of statute, capable of acquiring, owning and disposing of property, real and personal, and represents unity, and that nothing but death or divorce can dissolve this community.

(b) That the property it acquires is known as the community property, and the title thereto is not blended in its members, “not united merely, but unified, not mixed but identified”, and that neither member of such community, acting independently, can affect the status of the community real property; that is to say, neither member of the community can separately convey, or contract to convey or mortgage or create a lien against the community real property, and that any attempt to do so, is utterly void. That to do so lawfully or affectively, the community itself must act, or ratify.

(c) That the one-half interest held by each member of the community, in all the community property, both real and personal, represents a fixed, vested right of property, and that the one has no different or larger proprietary interest in such property, than the other.

(d) That under this statute, the separate debts of neither the husband nor wife, can be enforced against the community real property at all, nor against the husband's interest therein.

(e) The legislature saw fit to clothe the husband with reference to the personal property of the community with the power of sale, the same as of his own separate property, and made the husband the trustee of the community, as distinguished from the community itself, with reference to the management of the community personal property.

But this power ceases the moment the community personal property is converted into cash, when the wife has the right as a member of the community to be heard with reference to its use.

(f) Each member of the community has the lawful right to do business for himself or herself, independently of the community, or the community relations, and as such, may acquire separate property and create separate debts, as though the community itself did not exist.

The community property law of the State of Washington is different in many essentials from the community property laws in other states, and any decision relating to this subject matter, from Cali-

fornia or any of the other community property states, is of slight value, by reason of these distinctions.

For instance, in the State of Washington, our community property law, gives to the husband and wife, a vested right of property, and the interest of the husband and wife are not only equal, but unified, not mixed or blended, but identified, and we call the court's attention to the case of *Holyoke vs. Jackson*, reported in

3 Wash. Territory, 235,
in which, the principal opinion was written by the then Chief Justice Greene, one among the ablest jurists in the Northwest, and, in speaking of this community and its similarity to co-partnership, the court said:

“A conventional community, in a state where statutes would permit, might be contrived which would be substantially a partnership; but an ordinary legal community is, in many important particulars, quite distinct. It is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both, a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape

from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*,—a creature of the statute. By virtue of the statute, this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband, and lay it upon husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate', bestowed by the ninth section of the act of 1873, was a mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done. When, therefore, in 1880, the plaintiff in error, without

his wife, entered into an agreement to sell the land in question, he agreed to do what he himself, by himself, could not do, and therefore could not agree to do. To make an actual sale or conveyance without his wife, he had no power. The law says such a thing shall not be done. An agreement proposing it is in conflict with the law, and void."

Judge Hoyt said:

"By section 8 of the statute of 1879, the husband is clothed with a certain trust in respect to community real property. The management and control of it is vested in him, not for himself, but for the community. Besides this, he with the wife, is endowed with power to dispose of it. This power, too, is in trust for the community, for we must distinguish the community called into existence by the statutes from the two individuals who composed it. By a like distinction, a corporation is conceived to differ from its stockholders. * * * In the matter of disposing of community real property, husband and wife are, by the law of 1879, joint trustees for their mutual benefit in the community. Within the scope of their joint trust, neither can act without the other. No contract of disposition undertaken by either husband or wife, in contravention of his or her fiduciary relation to community real property, can be enforced so as to reach any such property, directly or indirectly."

And these words were cited with approval by the United States Supreme Court, in

Warburton vs. White, 176 U. S., 484.

9. We submit the broad proposition, that under the Washington community property statute, the real property belonging to the community, cannot be encumbered or its condition changed in any manner, directly or indirectly, so as to deprive either member of the community, of his or her vested rights therein, except by joint action, or by reason of some form of due process of law, by a court of competent jurisdiction, and that there is no power lodged with the referee in bankruptcy, under the bankruptcy law, to turn aside or ignore this provision of protection to the petitioner. That aside from the mere management of estates lawfully brought into the bankruptcy court, it has no power to substitute by any show cause order or citation, or any other process, the community or your petitioner, as a member thereof, which will bring into the bankruptcy proceedings, such community or your petitioner, for the purpose of determining the rights of property of the community, or her vested rights in this property, or for the purpose of determining the community debts, except upon process issued by the court in the nature of original process in a suit between the proposed parties, for that purpose.

We submit, as a proposition of law, that before the court in bankruptcy inquires into the community

property or disturbs the petitioner's vested right in this property, it must have jurisdiction of the community and then, it must be lawfully established, that the community itself, is insolvent, and there is no presumption that any debt is a community debt, in the sense of the bankruptcy statute. Such an insolvent proceeding, as we find here, under the community property statute of the State of Washington, and where the creditors proceed only against one member of the community and not against the community, there arises by law, two presumptions, one, that the insolvency proceedings relate only to the separate debts and property of the involuntary bankrupt named, and, second, that there are no community debts and that the community, itself, is solvent, else the community would have been brought into the bankruptcy proceedings originally.

Again, until it has been made to appear affirmatively that there are sufficient community debts to make the community insolvent and until each member of the community has been brought before the court by the usual process, the question of the insolvency of the community is not involved, and when involved and properly before the court, as against a charge of insolvency, your petitioner and the community would have the right to plead sol-

vency of the community, and upon such plea the community and your petitioner would be entitled to a jury, as to the question of the insolvency of such community.

But, upon the face of these proceedings, the value of the property, the amount of cash in the hands of the trustee and deposited in the bank, accruing from sale and rentals of admittedly community property, are sufficient to show that the community is solvent, and if solvent, the court in bankruptcy has no jurisdiction, and cannot secure jurisdiction, except the insolvency of the community be established in the manner contemplated by the Act of Bankruptcy of 1898.

10. We contend that in principle, Sub-section G., of Bankruptcy Act, applies to the "community" in the same sense and with the same particularity as though it were a co-partnership, and this sub-section authorizes the court in bankruptcy to marshal and distribute the assets of the co-partnership estates and individual estates, but Sub-section H provides in substance that when one or more, but not all the members, of a co-partnership is an adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by the consent

of unadjudicated partners, and this provision is clearly for the purpose of enabling the solvent partner to settle the partnership business, outside of bankruptcy, and the consent required here, is required to prevent bankruptcy proceedings in just such a case as this, where the proceeding in bankruptcy, is against one or more of the partners, but not against the co-partnership. See the cases of

In re Meyer, 2nd Circuit C. C. A., 98 Fed., 276:

Dickas vs. Barnes, 6th Circuit, C. C. A., 140 Fed., 849.

This law has been construed absolutely to prohibit bankruptcy without the consent of the adjudication by an individual partner and

In re Bertenshaw, 8th Circuit, C. C. A., 150 Fed., 363,

the court said:

“No express provision can be found in the legislation and no indication or implication is presented it, that the adjudication of a partnership draws into the administration of an estate in the court of bankruptcy, the property of the solvent partners who were not adjudged bankrupt.”

In all proceedings in bankruptcy, against one member of a partnership, as this bankruptcy proceeding is against one member of the community, the

adjudication in bankruptcy cannot be maintained, unless all the members of the co-partnership are insolvent, because insolvency is the essential element in the act of bankruptcy to give the court jurisdiction.

Collier, on bankruptcy, 10th edition, 1914, page 152, in speaking of this question, says:

“Where the assets of a partnership, together with the individual properties of each partner, exceeds their liabilities, the partnership is not insolvent.”

In re Perley, 138 Fed., 927.

In the case of

Francis vs. McNeal, 3rd Circuit, C. C. A. 186, 481,

the Circuit Court of Appeals said:

“A partnership cannot be adjudged bankrupt in an involuntary proceeding, unless it has committed an act of bankruptcy. If the action judged, be one involving insolvency, since every partner is liable in *solido* for all the partnership debts, the adjudication against the partnership must be based upon the allegations and provisions that the assets of its members in excess of its individual debts, plus the assets of its partnership, are insufficient to pay the partnership debts, otherwise, there is no partnership insolvency, notwithstanding the entity doctrine.”

Here, we have the involuntary bankruptcy of Pat Gibbons, a member of the community, being a creature of statute, as a co-partnership is a creature of agreement, in which neither member of the community has consented to the bankruptcy proceedings; in which only one member of the community was before the bankrupt court; in which it affirmatively appears that *substantially* all the debts by reason of which Pat Gibbons was adjudged a bankrupt, were the separate debts of the bankrupt, for which the community property is *not* liable; in which the community, itself, is affirmatively shown to be solvent, and not insolvent, because the record discloses that the aggregate of the debts proved against Pat Gibbons, the bankrupt, amount to \$97,833.39, the value of the property as appraised is \$145,000 independent of the lease, and subject to the lease, appraised at \$100,000, and the railway on the land used in connection with the coal mining operation, appraised at \$6,000, so that we have the community estate appraised at \$151,000, which was done by appraisers appointed in this bankruptcy proceeding, and hence officers of the court, and for this purpose must be accepted as its value under the Bankruptcy Act, so that upon the face thereof, the value of this community property is \$53,000 in excess of the aggregate

of the *separate* debts and the *community* debts and this fact admitted upon the record, that *substantially* all this \$97,883.39 of debts are the separate debts of the bankrupt.

11. Under the conditions existing here, and the uncertainty of what the purchaser by way of title would receive, at such a sale, the community property sold at \$48,050, thus wiping out property appraised at \$151,000 for a nominal sum, and thus the record establishes the reason and the justice of the law, which requires that the community be affirmatively shown to be insolvent before its property can be sacrificed in any such a manner and we submit that such a proceeding as we have here, and the exercise of the powers of the court of bankruptcy in the manner it was exercised here, so clearly results in confiscation of property and its value that the reason for the law, as herein contended for, proves its necessity. Here, we have the community and the community property, in which, your petitioner has a vested one-half interest, and of the value of \$151,000, taken away from her without notice, sold under an order in a proceeding to which she was not a party, reducing the value of her estate without her being before the court in excess of

per cent, and if upheld by the courts, it results in the taking without any process whatever against your petitioner, her vested rights in property, the appraised value of which, is more than \$75,000, and she is asked to accept in lieu of this \$75,000, \$24,025, less than one-half its appraised value and hindered with the expenses and costs of insolvency to the amount of thousands of dollars, and because to the end that the creditors of Pat Gibbons has filed an involuntary petition in bankruptcy and established debts without regard to the community and without regard to your petitioner, and without regard to the debts of the community or the debts of your petitioner, and passed over to the purchaser of such property, more than \$50,000 worth of her property, without your petitioner having her day in court, as to the debts, the amount or their character, and without regard to the solvency or insolvency of the community as such and so far as she is concerned without having heard her as to the necessity for, or of the sale or without reference to any other rights, relating to her property.

12. And, after this has been done without notice to her, without the consent of either member of the community, and after the sale has been made and

the proceeds of sale paid into the hands of the trustee, in a proceeding to which she was not a party, and not until the court is ready to distribute the proceeds of the sale to the creditors of the bankrupt, is she invited to come in and show what claim or right or title she has or claims or claimed, in and to said property already sold. If that be the law, then no milder term can be applied to it than robbery.

These creditors might have filed an involuntary petition in involuntary bankruptcy against this community composed of Pat Gibbons and wife, and alleged the insolvency of the community and its members and that these debts were in part or wholly community debts, showing the items of each, and thus brought the community together with the other individual member thereof before the court in bankruptcy and required the community to meet such petition; but in doing so these creditors would have at once forced the proposition of establishing at the threshold of the proceedings the fact that the community was insolvent and unable to pay its debts, for which the community property was holden. So we think it is to be presumed from all these facts that these creditors knew that this community was *not* insolvent and that if they started the machinery in

the court of bankruptcy, the fact presented to the court by the community would instantly stop such machinery and deprive the court of bankruptcy of jurisdiction; and evidently these creditors must have concluded that your petitioner was ignorant of her rights or might overlook them, and that by this procedure a \$150,000 community estate would be grabbed for a nominal sum to pay separate debts of the bankrupt and that your petitioner might, in some way, be estopped from questioning the sale, after the distribution of the funds had been made; but fortunately for her, the trustee at first refused to accept the rentals under the lease of this community property and thus compelling the lessee, in good faith and to protect his lease, to pay the money over to the bank; and there it remained deposited until the community property was sold and the trustee had the \$48,050 in his possession and desired a distribution when he undertook to say to the bank, "I will now accept that deposit and we will let it all be distributed at the same time". But just here, the bank, recognizing the community interest of your petitioner and the community character of such funds in its possession, was immediately confronted with its liability to the petitioner in the event it permitted the money to be turned over to the trustee and

refused to pay the money to him. The trustee and these creditors were thus forced, from the necessity of these circumstances, before going any further to attempt to bring your petitioner before the bankruptcy court in these bankruptcy proceedings.

13. It has been clearly established by the Federal Courts, by the great weight of authority, both as to results and as to the reasoning upon which it is based, that the adjudication of individual members of the partnership does not draw into the bankruptcy proceedings the assets of the partnership, of which the bankrupt is a member, but against which no bankruptcy proceedings are pending.

In re Mercur, 3rd Circuit, C. C. A., 122, Fed., 384. (Reported in 56 C. C. A., 472)

in which, the court used this language:

“There has been no adjudication against the firm, the trustee was not appointed to represent it, but only the one member who happened to oppose it in their separate and individual capacity. Under such circumstances, the trustee has no authority to interfere with the firm assets.”

14. This creature of the Washington community property statute is dissolved only by death or divorce, and if by death, then the estate could not be

administered upon, in bankruptcy, but would require to be administered under the probate laws, and if dissolved by divorce, the property question, the payment of the community debts, as well as the separate debts and the distribution of the property, is taken care of in the decree of divorce. Therefore these questions effecting the community as such and the rights of your petitioner in this community property can only be determined when the community is before the Court of Bankruptcy and then only when such community is shown to be insolvent.

15. Section 70 of the Bankruptcy Act provides that the trustee, upon his qualification, shall have been vested by operation of law with the title of the bankrupt, which, prior to the filing of the petition could have been "sold under judicial process against him," sec. 36, *U. S. Stat. at large* 838. *Collier on Bankruptcy*, pg. 987, and this, we submit is a limitation of his right of possession and control, and ought not to be enlarged by judicial construction so as to include property claimed by others, and this section is to be construed particularly with regard to individual bankrupts, and not to property in which such bankrupt may have an interest as a member of a co-partnership, or of a community, under the community property laws. The said courts, as shown in this brief, have drawn the line very strictly,

between property owned by an individual, and property owned by a co-partnership.

Under the Washington statute, execution could not be lawfully levied against the community, for the bankrupt's debts, and Pat Gibbons' interest in the community property could not be sold under judicial process against him alone, until the wife, the other member of the community, had her day in court, and not until it had been judicially determined that the debt for which the property was to be sold, was a community debt, and the Supreme Court of the State of Washington, has, at no time, disputed this proposition.

In *McDonough vs. Craig*, 10 Wash., 244, the court said:

“That the *prima facie* conclusion following from the rendition of the judgment, can only be made judicially conclusive by some action to which the wife is a party is too evident to require argument. From which it would follow that not only the rights of the creditor, but those also of the husband and wife as members of the community, would be best subserved by having the *prima facie* presumption made conclusive, at the earliest possible moment. * * * It necessarily follows that the plaintiff is entitled to have his judgment show upon its face the fact that it is for a community debt. Otherwise, it would not appear therefrom, that it was a lien upon community property.”

And we submit that judicial process mentioned in Section 70 above, must be such a process as in effect in law creates a lien upon the community property, and such a lien in the nature of a judgment can be created only when the community itself is before a court of competent jurisdiction, and it be judicially determined that the debt for which the property is to be sold under judicial process, is a community debt, and this same doctrine has been upheld and reaffirmed in the following cases from the Supreme Court of the State of Washington:

Powell vs. Nolan, 27 Wash., 318.

Sloane vs. Lucas, 37 Wash., 348.

In re Steyer, 98 Fed., 290.

Section 5918, *R. & B. Code of Wash.*, reads:

"The husband has the management and control of the community real property. All such community real property shall be subject to liens of judgments recovered for community debts, and to sale on execution issued thereon."

Can it be reasonably argued from this record, that the community character of any of the debts mentioned or proved in the involuntary bankruptcy proceedings of Pat Gibbons, constituted in effect, judgments recovered for community debts? The court will remember that there is no mention made in the involuntary petition for the adjudication of

the bankruptcy of Pat Gibbons, and nowhere in the record does it appear that the question as to whether or not any of the debts were community debts of Pat Gibbons and your petitioner, was ever considered. This section of the Washington statute provides that community property can only be sold upon execution to satisfy liens of judgments recovered for community debts, and Section 47 of the Bankruptcy Act vests the trustee only with the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceeding thereon, or an execution duly returned unsatisfied, and throughout these provisions of both the state statute and the Act of Bankruptcy, the necessity for a judicial determination that such a debt is a community debt, is ever present, and it must necessarily follow that that question cannot be adjudicated or made effective against the wife, unless she is a party.

Two fatal objections appear upon the face of this record: to the right of the trustee to sell the community real property, and which is involved in the money accruing therefrom, to-wit: the fact that no claim is made that any one of the debts was a community debt, and second, the absence of one member of the community, which would forbid a judicial determination of that question, effective against the community.

16. In holding that the District Court, exercising its powers in these bankruptcy proceedings, had authority to compel your petitioner by citation to come into the proceeding and submit to the jurisdiction thereof and have her property rights determined herein, the court finally rested such decision upon the proposition that the Supreme Court of the State of Washington had held "*that an execution issued on a judgment obtained against the husband for a community debt may be levied upon community real property,*" and from this statement concluded that these creditors in filing herein an involuntary petition in bankruptcy against Pat Gibbons, placed the community property and the rights of your petitioner in the same adjudicated condition as if the creditor had obtained judgment against the husband, Pat Gibbons, for a community debt; but, we submit, first, that this doctrine announced by the District Court is not in point and is not applicable to this proceeding. In the first place, it is an involuntary bankruptcy proceeding and no authority can be pointed out under the bankruptcy act of 1898 which gives this force and effect to an involuntary bankruptcy proceeding against the husband.

The cases from the State of Washington, relied upon by the District Court, are as follows:

Curry vs. Catlin, 9 Wash. 495.

Horton vs. Donahgue-Kelly Banking Co., 15 Wash. 399.

Allen vs. Chambers, 18 Wash. 341.

Thygesen vs. Neufelder, 9 Wash. 455.

But an examination of each of these cases will, we think, convince the court that the District Court was in error in holding that these decisions were controlling here.

In the *Curry* case both members of the community and hence the community itself were parties to the suit in the Superior Court brought to enjoin an execution issued on a judgment obtained against the husband based upon a promissory note signed by the husband alone, where the execution was levied upon real property standing in the name of the wife on the records, and this action was consolidated with an action instituted by one Catlin against the wife and her husband to subject certain alleged community lands standing in the name of the wife alone, to the lien of the judgment rendered against the husband for a community debt, and the issue tried out was whether or not such lands were the separate lands of the wife, or the lands of the

community, and the court held that such lands were community lands, but the decision was rendered in the case of *Catlin vs. Curry*, being the action to subject certain lands alleged to be the separate lands of the wife, community lands and hence subject to execution for a community debt which had been duly established as such in the Superior Court upon process against the community, and to emphasize our contention that before an execution, based upon a judgment against one member of the community, can be levied upon community real property, the Honorable John P. Hoyt, then a member of the Supreme Court (and at the hearing herein the referee in bankruptcy), in a concurring opinion on page 499, said:

“I agree with the conclusion of the majority as to the merits of the controversy, but I cannot assent to that part of the opinion in which it is stated that the complaint of Catlin, by which he sought to have an adjudication that his debt was one which could be enforced against community property, did not state a cause of action; for while it is true that the presumption that it could be so enforced, yet the fact that such presumption is only a *prima facie* one, might largely effect price which would be realized upon a sale of the community property to satisfy the judgment. The plaintiff should have the right to have the status of his judgment conclusively established before the sale of community property thereunder.”

The *Horton* case was one involving the liability of the community for an obligation of suretyship incurred by the husband on behalf of a corporation in which he was an officer in order to protect the property and business of the corporation, and it was held that presumptively in doing so he was acting for the community, and that it was a community debt, and again, we have all the parties in interest before the court brought in by the usual process.

In the *Allen* case all the parties in interest were before the court by the usual process. The action being in the Superior Court of Washington to recover for a debt upon which a member of the community was only a surety. The defendants, including the community of Chambers and wife, set up affirmatively in their answer that the money secured on the note was for the benefit of and used by the Light and Power Company, a corporation, but the court entered judgment against the defendants, including the community for the amount found due, but made an order staying the issuance of an execution until the plaintiff had recovered judgment against that corporation and by levy exhausted its property, thus entering a restricted judgment, which the Supreme Court reversed and directed the restrictions to be omitted. In that case your Honors

will see that it was a judgment in a court of competent jurisdiction against the community, and in the case being discussed the judgment was held to be a lien upon the community real property of Chambers and wife, but before the execution was levied the community conveyed the property to a third party, and the execution was issued and returned "no property found." Thereupon the judgment creditor filed this action against Chambers and wife, Frost and wife and the representatives of the deceased, to whom the title had been conveyed, asking to have the judgment adjudicated a lien upon the real property of Chambers and wife conveyed and to set aside the conveyance and require the property to be subjected to sale and satisfaction of the judgment, and this decision clearly upholds the principles of law for which we contend here. That there may be a judgment against one member of the community for a community debt, but before execution may be levied upon the community property and the same sold, the other member of the community must have her day in court.

The *Thygesen* case is the one upon which the District Court seems finally to have rested its right to subject the community party of Gibbons and wife to the administration of the court in bankruptcy in

this proceeding, and in that case the husband, Thygesen, made and filed in the Auditor's office in Whatcom County, Washington, a deed of assignment responsive to the provisions of the insolvency statute, enacted by the legislature of the State of Washington, March 6, 1890, naming an assignee, who failed to qualify, and Neufelder, under the provisions of the statute, was appointed by the Superior Court and qualified as such assignee, and as such he collected certain moneys due upon a lease, which had been executed by Thygesen to Brown & Carter, and thereafter Thygesen and his wife filed their petition in the court, seeking to have the assignee account for and pay over to them the money collected by him under the lease, instead of distributing to the creditors.

There your Honors will see that the deed of assignment was the voluntary act of the husband and that the community thereafter voluntarily submitted to the jurisdiction of the court in that proceeding. The trial court granted the petition but the Supreme Court reversed and dismissed the petition, but no disputed question of fact was presented in that case. The court said:

"It is conceded that the real estate for the use of which the rent was paid, was community property, and it is also conceded that the debts

which have been proved in the insolvency proceeding were those of the community. If the deed of assignment executed by the husband alone is to be construed as a conveyance of the property therein described to the assignee named therein for the purpose of having it applied to the payment of his debts, it is clear that it could not have force so far as the community property is concerned. In other words, if the assignment therein made is to be treated simply as a conveyance at common law and the provisions of our statute applied thereto, in aid of the common law assignment to be created, the property of the community could not be conveyed thereby."

So that your Honors will see that this case, relied upon by the District Court, is not in point and is not analogous, and the very questions of disputed facts here were admitted there, and again, it will be noticed that the Supreme Court in that case was construing a statute enacted in aid of the common law assignment. The assignment by the husband was made voluntarily, but the assignee failing to qualify, another was appointed under the provisions of the law by the Superior Court in a proceeding regularly instituted for that purpose under the insolvent state law, and thereafter the community submitted itself to that jurisdiction and invoked the jurisdiction for relief, and we ask the court to carefully read this decision, and while considering it

the court will recall the fact that this decision, its meaning and effect, must be determined with reference to the Act of the State of Washington, entitled "An act to secure creditors a just division of the estates of debtors, etc.,," Session Laws 1889-90, 83, and while we have never been able to fully comprehend the logic of a portion of this decision, particularly relating to the distinction between a deed of assignment and a conveyance, still we insist that this decision ought not to be controlling in these proceedings, even though given the full force and effect accredited to it by the District Court; that decision was not made with reference to any Federal Bankruptcy Act, under which we now look for the powers of the District Court in its administration of the estate of insolvents. In that case not only were all the parties in interest before the court by consent upon the community's own motion, but nowhere was the question of the solvency or insolvency of the community or the other member of the community presented or involved, and we cannot believe that the Supreme Court of the State of Washington would now hold, or ever did hold, that an involuntary petition in bankruptcy as to one member of the community, without mentioning or attempting to bring before the court any community debts, consti-

tutes in effect and in law under the Washington community property law, a judgment based upon which the trustee in bankruptcy might sell the community property as the same might be sold upon execution based upon a judgment in a suit wherein it had been adjudicated that the debt was a community debt and constituted a lien against the community property.

We respectfully submit that the action of the District Court should be reversed.

ISRAEL & KOHLHASE,
JOSEPH W. ROBINSON,
Solicitors for Petitioner, Mary L. Gibbons.